COMMENT.

The efforts that have been put forth to have the sentence for murder disaffirmed which was pronounced upon Buchanan in the New York courts more than two years ago, do not seem to have been well directed in the case brought before the U. S. Supreme Court (*In re Buchanan*, 15 U. S. Sup. Ct. Rep. 723). An application for a writ of error to the Court of Appeals failed to disclose any ground whatever to justify the granting of such a writ, the question presented being purely one of fact. The petitioner endeavored to raise a constitutional point by asserting that the trial and conviction had been "without due process of law" in that the jury which rendered the verdict were not twelve men of sound mind and memory as contemplated in the Constitution. But it appeared from the record that the only objection to the jury was based on the alleged mental and physical incapacity of one juror who was taken ill while in the jury room. A motion for a new trial having been made in consequence, it was sufficiently made out upon proof, that the illness was temporary, and had in no way prejudiced the accused, having occurred after a decision of "guilty" had been reached, the separation for medical attendance being involuntary, the recovery sufficient for the juror to confer about the case and render a verdict with the others. The denial of the motion was the exercise of judicial discretion as to the competency of the juror to return the verdict, the opinions in support of the motion being premised on statements given them, the opposing testimony based on personal examination. The denial of the motion appeared perfectly satisfactory and the judgment was one of fact which the court cannot review. No right, privilege or immunity under the Constitution was specially asserted, and the whole claim fell far short of a federal question.

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Is there a common law of the United States? This question is ably argued in the opinion delivered in the case of *Swift* v. *Philadelphia & R. Ry. Co.*, 64 Fed. Rep. 59. Action had been brought to recover back freight exacted in excess of a reasonable rate, prior to the operation of schedules provided by the Interstate Commerce Act, and the conclusions reached by the court are summarized as follows: "The right to recover from common carriers for unreasonable exactions must be found in some positive law of

the land applicable to the case in hand. Such a prohibition is in fact found in the common law; but it is not applicable to the case in hand unless there be a common law of the United States as a distinct sovereignty, because the regulation of the rates upon which the suit is dependent is within the scope of interstate commerce and an exclusively national affair. Following its former opinion, delivered in *Swift* v. *R. R. Co.*, 58 Fed. Rep. 858, the court held that the United States has no common law of its own, and pointed out the anomalies that must follow such an assumption; for it would at once result in "two separate systems of law over the same subject matter and the same territory," one the law of the State, the other the "common law" of the nation. Inasmuch as the latter would necessarily cover almost the entire field of State legislation, the doctrines of dual sovereignty and concurrent jurisdiction become as impossible as they are illogical. Article 6 of the Constitution was also cited as defining the supreme law of the land to consist "in the constitution and such laws and treaties" as should be made in pursuance thereof, without any reference to the common law of England. In opposition to the view as given above, it has been urged that the Supreme Court has always recognized the existence of "general" or "common" law, and the case of *Railroad Co.* v. *Baugh*, 149 U. S. 368, is cited, in deciding which Justice Brewer said it depended upon no statute nor local usage or custom, but "upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the common law." In referring to this decision the court very clearly demonstrated that the Supreme Court was there defining State common law; in other words, that when the decision of the highest tribunal of a State is overturned, we are not to suppose an introduction of new law, but a better interpretation of existing law, which, in the Ohio case cited, was the common law of that State.

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The difficulty of finally settling questions of railroad transportation by legislative enactment is made apparent by the frequent cases involving a construction of the Interstate Commerce Act. The decision in the case of *Parsons* v. *Chicago & N. W. R. R. Co.*, 63 Fed. Rep. 903, gives an interpretation of the "long and short-haul" clause in the event where two connecting carriers unite in putting in force a joint rate between given points. The plaintiff instituted an action for damages, because the defendant company, as he alleged, had charged him more for freighting corn from Carroll, Iowa, to Chicago, than they were charging for a greater

distance, viz.: from Blair, Neb., to Chicago by way of Rochelle, Ill., the terminus of the route. It appears from the evidence that the lower rate only applied to through shipments via Rochelle to New York and other eastern seaboard cities, the defendant company having established a "joint rate" in common with carriers who took the grain on from Rochelle. The court upheld the ruling of the trial court that a local rate between points on the same road is not necessarily unlawful because it is higher than the rate charged under a joint tariff established by connecting carriers for a much longer distance. Where two connecting carriers thus unite, "they form practically a new line whose rate is not the standard by which to determine the reasonableness of local tariffs on either line," and *Railway Co.* v. *Osborne*, 10 U. S. App. 430, was extensively cited to prove that "undue preference to a person or locality" does not follow in law because there is a disparity between a local and a joint rate.